(1)

88-463

Supreme Court, U.S.
FILED
AUG 23 1988
JOSEPH F. SPANIOL, JR.
CLERK

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1988

In re:

RICHARD CHARLTON,

Petitioner,

v.

ENTERPRISE LEASING CORPORATION,
a California corporation; **JAMES P. DUNLAVEY,**
SAN ANGELO & CO., LTD.

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Joseph W. Charles

CHARLES, McGUIRE, HAKES, KEIST & THOMPSON, P.C

5704 W. Palmaire Avenue
P.O. Box 1737
Glendale, AZ 85311
(602) 939-6546

Counsel of Record for Petitioner

QUESTION PRESENTED FOR REVIEW

Are the state statutory time periods **tolled** in regard to the forfeiture of one's interest in real property due to a Deed of Trust Sale [1] once a debtor files a petition with the United States Bankruptcy Court?

LIST OF ALL PARTIES TO THE PROCEEDINGS IN THE UNITED STATES COURT OF APPEALS

The parties who actively took part in the proceedings in the United States Court of Appeals were Debtor/Appellant Richard Charlton, and Plaintiff/Appellee Enterprise Leasing Corporation; William Piatt and Joseph W. Charles. Other parties who were listed in the proceedings below as possibly having an interest in the property which is the subject of this appeal include: Jon N. Vogel; James P. Dunlavey, and San Angelo & Co., Ltd.

---

[1] Deeds of Trusts are very similar to mortgages excepting that at the time of a Deed of Trust Sale, an owner's interest in the property is completely forfeited with no right of redemption. The right of redemption is a normal feature of mortgages. **No legal research** including a national computer case review could find cases concerning the integration of the automatic stay provision associated with the Bankruptcy Court filing with the tolling of the state statute concerning deed of trust sales.

TABLE OF CONTENTS

	PAGE
TABLE OF AUTHORITIES	ii
OPINIONS BELOW	1
JURISDICTION	1
CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED	2
STATEMENT OF THE CASE	2
REASONS FOR GRANTING THE WRIT	4
CONCLUSION	9
Appendices	
Appendix A	A-1
Appendix B	B-1
Appendix C	C-1
Appendix D	D-1
Appendix E	E-1
Appendix F	F-1
Appendix G	G-1

TABLE OF AUTHORITIES

CASES	PAGE
IN RE: CAPITAL MORTGAGE & LOAN, INC., 35 B.R. 967 (1983)	7
IN RE: THOMAS J. GROSSO INVESTMENT, INC., 457 F.2d 168 (9th Cir. 1972)	7
PATTON v. FIRST FED. SAVINGS & LOAN ASS'N. OF ARIZ., 118 Ariz. 473, 578 P.2d 152 (1978)	6
SAPPHIRE INVESTMENTS v. STEWART TITLE AND TRUST OF TUCSON, 19 B.R.492 (1982);	7
STATE v. HAAS, 138 Ariz. 675 P.2d 673 (1983)	8

OPINIONS BELOW

The Bankruptcy Court lifted the stay concerning the real property owned by the Debtor, **RICHARD CHARLTON**. Hereafter, **RICHARD CHARLTON, Petitioner** and **Debtor**, shall be referred to for clarity as **CHARLTON**. The property was sold at a Trustee's sale to **ENTERPRISE LEASING**. **ENTERPRISE LEASING** is **Respondent** and creditor and shall be referred to for clarity as **ENTERPRISE**. The Bankruptcy Court granted Summary Judgment against **CHARLTON** and a trial was held concerning the total claim to be granted to **ENTERPRISE**. The final order of the Bankruptcy Court was appealed to the District Court, where it was upheld. The District Court affirmed the Bankruptcy Court and the matter was appealed to the Ninth Circuit. The Ninth Circuit entered its first order on March 24, 1988, (set forth in its entirety as Appendix "A"). Subsequently, the Ninth Circuit Court of Appeals was informed of a gross error in its Order and an Amended Order was entered on May 26, 1988, (set forth in its entirety as Appendix "B"). The Ninth Circuit entered an order denying a rehearing on May 26, 1988 (said order is attached in its entirety as Appendix "C").

JURISDICTION

CHARLTON filed a proceeding under Chapter XI of the Bankruptcy Act on May 7, 1979. The Bankruptcy Court entered an Order and Judgment on March 25, 1987, affirming the trustee's sale to **ENTERPRISE** [2]. On April 10, 1987, **CHARLTON** filed his notice of Appeal to the United States Court of Appeals for the Ninth Circuit. On March 24, 1988, the Ninth Circuit entered its order affirming the District Court opinion. On May 5, 1988, the Court of Appeals for the Ninth Circuit entered an order amending its earlier order affirming the District Court opin-

---

[2] **ENTERPRISE'S** original debt was for $65,000.00. **ENTERPRISE** sold the real property and profited the approximate sum of $100,000.00. This issue was not addressed by the trial court and is of secondary importance to this appeal.

ion. On May 26, 1988, the Court of Appeals for the Ninth Circuit entered judgment denying **CHARLTON'S** Petition for Rehearing. This Court has jurisdiction under 28 U.S.C Sec. 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The Constitutional provisions and statutes involved are Amendments V and XIV to the United States Constitution; §67(D)(1)(e) of the Bankruptcy Act, [11 U.S.C. §107(D)(1)(e)] and §67(D)(2) of the Bankruptcy Act, [11 U.S.C. §107(D)(2)], Rule 601 of the former Rules of Bankruptcy Procedure; Arizona Revised Statutes Sections 33-807, 33-809, 33-813, 44-1033, and 44-1044.

STATEMENT OF THE CASE

This petition arises out of **CHARLTON'S** Chapter XI Petition under the Bankruptcy Act. At the time his petition was filed, **CHARLTON'S** principal place of residence was a home located at 5642 E. Rockridge, Phoenix, Arizona (hereinafter referred to as **Rockridge**). Western Savings and Loan held a first Deed of Trust lien position on **Rockridge** at the time **CHARLTON'S** Chapter XI petition was filed. Attached hereto as Appendix "D" and incorporated by reference is the Notice of Trustee's Sale requested by Western Savings. The Notice of Trustee's Sale is shown to be recorded on the 15th day of March, 1979 and the petition by **RICHARD CHARLTON** is dated May 7, 1979.

The trustee for Western Savings tendered notice to all secured parties that the property would be sold not earlier than the expiration of ninety days from the recording of the notice of the sale in accordance with A.R.S. §33-807 (see Appendix "E"). When **CHARLTON** filed his Chapter XI Petition, an automatic stay was entered in accordance with Rule 601 of the Bankruptcy Rules (see Appendix "F", also refer to Rule 11-44,) staying any further proceedings pertaining to **Rockridge** without further order of the Bankruptcy Court. The period of time between the Notice of

Trustee's Sale set forth as Appendix "D" and the filing of the Chapter XI petition was approximately 53 days.

CHARLTON and Western Savings attempted to enter into a settlement concerning the lifting of the automatic stay. The settlement agreement was not timely entered into, and in accordance with the settlement agreement under paragraph (B.3), the agreement was null and void without any procedural value or binding effect (see Appendix "G"). At the request of **ENTERPRISE**, and over the objection of **CHARLTON**, the Bankruptcy Court ordered the stay lifted in regard to **Rockridge** on or about April 30, 1980. Furthermore, Western Savings agreed with **CHARLTON** in opposition to **ENTERPRISE** to continue the effect of the stay for the protection of **CHARLTON**.

ENTERPRISE was in a junior security position to said real property and contemplated a Trustee's Sale to be held the very next day. On April 30, 1980, **ENTERPRISE** purchased the security position of Western Savings and was assigned the first security position. Jeffrey Gage allowed himself to be substituted as trustee under the original Deed of Trust in favor of the attorney for **ENTERPRISE**, William Piatt, a member of the Arizona State Bar. [3]

The trustee's sale then scheduled for May 1, 1980, was held at the offices of Jeffrey Gage. There was no attempt made by William Piatt as Substitute Trustee to advertise or obtain additional bids for the purchase of the **Rockridge** Property. No additional time was granted to the debtor other than the original fifty-three (53) days as stated earlier.

Rockridge was valued by **CHARLTON** in excess of $300,000 and by an appraisal commissioned by Western Sav-

---

[3] Throughout the proceedings, **CHARLTON** alleged a gross violation of statutory procedures in regard to the sale. State law required the sale to be held at the offices of the trustee, place of the Courthouse, or at the property. Obviously William Piatt did not hold the sale at his office in accordance with these facts. Furthermore, William Piatt mailed Notices on April 30 of the sale to be held May 1. These confusing facts are readily demonstrated in Appendices "A" and "B".

ings to be in excess of $280,000. Notwithstanding this fact, the property was purchased as the trustee's sale for a bid of $161,000 by William Piatt on behalf of **ENTERPRISE**. No other bidders were present or sought for in regard to this sale. Shortly thereafter, **ENTERPRISE** sold the property for the approximate sum of $250,000.00. **ENTERPRISE** further prosecuted their administrative claim for the original debt of $65,000.00, and, after a hearing before the Bankruptcy Court, **ENTERPRISE** obtained Judgment in their favor for the sum of $103,856.00. **CHARLTON'S** bankruptcy estate at this time has an approximate value of $400,000.00. **ENTERPRISE**, for their original note of $65,000.00, will recover approximately one-quarter of a million dollars as a result of their involvement in **CHARLTON'S** bankruptcy.

REASONS FOR GRANTING THE WRIT

I. Due Process of Law, the Bankruptcy Statutes and Rules, require that this Court correct the clear abuse suffered by the Debtor whereby all of his property rights were forfeited while under the protection of the Bankruptcy Court.

CHARLTON has been divested of all of his right, title and interest in and to his real property which was under the jurisdiction and protection of the Bankruptcy Court as a result of his proper filing of a Chapter XI Petition. **Constitutional due process of law** and the **Bankruptcy Statutes** theoretically afforded **CHARLTON** certain fundamental protections, which he was not actually afforded.

The automatic stay protects individuals from the forfeiture or loss of property while under the protective umbrella of the United States Federal Bankruptcy Court. The fundamental question presented herein which affects citizens all across this country is whether this protection is afforded in a common sense and uniform way across the breath of this country. It is critical to understand that a clear reading of the automatic stay provision indicates that all matters are

stopped. This would undoubtedly dictate that actions are tolled without a running of statutory periods of time which affect one's property rights.

While this issue developed under the Bankruptcy Act of 1898, the principles of the new Bankruptcy Code are identical, and in this respect, therefore carry forward.

Bankruptcy petitions and forfeiture of property, are being witnessed in a record number across the country. Yet, there is a void of case authority as stated above, concerning the umbrella protection that is afforded debtors in regard to the taking of one's property as a result of a trustee's sales. Thus, there is an urgent need for this particular issue to be properly addressed by the United States Supreme Court. There are common questions as stated above concerning the uniformity of state statutes in regard to trustee's sales, and the crucial question as to the appropriate tolling of statutory time periods when a petition is properly filed in the United States Federal Bankruptcy Court. The Arizona Statute which is similar to that as adopted by a number of other states, is attached hereto and incorporated by reference as Appendix "E", which sets forth the ninety day reinstatement period which is common to deed of trust statutes.

The conflict arises when a petition is filed in the Bankruptcy Court. The automatic stay provision mandates that lien enforcement is stayed during the Bankruptcy Court proceedings. This would of course be in accordance with the Congressional intent of the Bankruptcy Laws to allow the rehabilitation of the debtor. Therefore, the issue is not whether the Bankruptcy proceedings take one day or one year, the issue is whether a stay provision is in fact invoked. If an automatic stay is entered, common sense dictates that the state's statutory time requirements are **tolled** until appropriate procedures are entered lifting the stay or ending the jurisdiction of the Bankruptcy Court.

The philosophical foundation of the automatic stay provision is to afford the protection to the debtor while under the umbrella protection of the United States Federal Bankruptcy

Court. It violates the common sense of the stay provision to argue that the time periods run on the same tract that the Bankruptcy Court is on when a petition invokes the Federal United States Bankruptcy Court jurisdiction. Does anyone question the fact that when a Bankruptcy Petition is filed, the statutory answering time is stayed or otherwise tolled in regard to a lawsuit previously filed against a debtor!

Furthermore, a reading of the two opinions set forth in Appendices "A" and "B" clearly indicates the gross confusion as to the circumstances whereby **CHARLTON** lost his Rockridge property. The Court of Appeals, after appropriate briefing and oral argument and the drafting of an opinion, grossly erred as to the circumstances surrounding the taking of **CHARLTON'S** property. In addition, the Court failed to address the critical issue which is the appropriate integration of the statutory procedures of trustee's sale under Arizona law with the Federal Bankruptcy Act of 1898.

The taking of property by way of trustee's sale is a forfeiture of one's rights and interests in said property. Therefore, if statutory notice requirements are not complied with, a trustee's sale is void. The Arizona Supreme Court has made it crystal clear in the opinion of ***PATTON v. FIRST FED. SAVINGS & LOAN ASS'N. OF ARIZ.***, 118 Ariz. 473, 578 P.2d 152 (1978) which states that sales are null and void when they are not followed correctly. In ***PATTON, supra***, the Arizona Supreme Court stated at page 155:

> The Deed of Trust Statutes in (A.R.S. Sec. 33-801 et seq.) specified the notice which must be given prior to a trustee's sale. If a sale is held without complying with statutory notice requirements, such sale would be void, for the statutes set forth the only procedure for a valid trustee's sale.

The primary question presented to this Court is whether or not there was the proper tolling of the statutory time required under the Arizona Statutes once a petition in the Bankruptcy Court had been filed by **CHARLTON**. Although it has earlier been submitted that there is an

absense of case authority concerning this particular issue, related cases can be found. IN ***RE: THOMAS J. GROSSO INVESTMENT, INC.***, 457 F.2d 168 (9th Cir. 1972). The Ninth Circuit Court of Appeals held that the Court may toll the running of six month right of redemption period following the foreclosure of a mortgage even though foreclosure occurred before the filing of the petition. See also, ***SAPPHIRE INVESTMENTS v. STEWART TITLE AND TRUST OF TUCSON***, 19 B.R. 492 (1982); ***IN RE: CAPITAL MORTGAGE & LOAN, INC.***, 35 B.R. 967 (1983), the Court dealt with the issue as to whether a senior lienholder violated the automatic stay by cancelling a loan to third party trustors in taking a quit-claim deed from the trustors in lieu of foreclosure when a junior lienholder was a debtor in possession. The Appellate Court held that the senior lienholder's actions did in fact violate the automatic stay. In ***IN RE: CAPITAL, supra***, at 971 the Court stated as follows:

> However, it is well established that Bankruptcy law provides that the filing of a Bankruptcy Petition operates as a stay of any act to enforce a lien against property in the custody of the Bankruptcy Court. The automatic stay prohibits the initiation of any steps, such as recording a notice of default that will lead to a foreclosure of property of the debtor's estate.

CHARLTON has earlier submitted that a number of statutory violations occurred in regard to his trustee's sale, all of which voided the sale in accordance with ***PATTON, Supra***. Yet the crucial issue that is submitted to this Court is the integration of the automatic stay rights afforded an individual when invoking the Federal Bankruptcy laws and those state statutory rights that concern the taking of property on a deed of trust sale.

The disturbing result of this case is that **CHARLTON**, a widower has been deprived of what he claims to be a $300,000 residence, **ENTERPRISE** has received their principal monies and have made an additional profit of $100,000 and federal and state statutory rights afforded **CHARLTON** have been fragrantly violated. Yet this result experienced by **CHARLTON** may be commonly occurring to a lesser or

greater degree, throughout this country as a result of a failure to have a clear mandate as to the proper protection afforded individuals.

The unfortunate result experienced by **CHARLTON** and what might be perceived to be the good intentions of the different individuals associated with this case might be analogous to the quotation found in ***STATE v. HAAS***, 138 Ariz. 413, 675 P.2d 673 (1983) whereby the Arizona Supreme Court quoted the following biblical admonition at page 681:

> **Beware of the scribes, which love to go in long clothing, and love salutations in the marketplaces, and the chief seats in the synagogues, . . . [and who] devour widows' houses and for a pretense make long prayer**
>
> **Mark 12:38-40 (King James).**

It is indeed unfortunate what has occurred to **CHARLTON** and this Court has the final opportunity to correct an injustice which has occurred not only in this case but which may well be occurring throughout this nation.

It is critically important for this Court to address the fundamental issue of whether the automatic stay provisions toll this state's statutory time period for deed of trust sales, and proclaim a message that due process of law will afford protection to all individuals invoking the jurisdiction of the United States Federal Bankruptcy Court. It is respectfully submitted that this matter does truly affect citizens throughout this country. Furthermore, there is absolutely no statutory or case authority which any individual could properly adopt for a clear determination of the issues presented herein. Thus, inconsistent results will undoubtedly occur, and, in cases similar to this, citizens of this nation will be deprived of property rights, all in violation of both state and federal laws.

CONCLUSION

The Petition for Writ of Certiorari should be granted.

RESPECTFULLY SUBMITTED this 15th day of September, 1988.

CHARLES, McGUIRE, HAKES, KEIST & THOMPSON, P.C.

Joseph W. Charles
5704 W. Palmaire Avenue
P.O. Box 1737
Glendale, Arizona 85311

Counsel of Record for
Debtor/Appellant

APPENDIX A

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

In re: RICHARD CHARLTON, *Debtor/Appellant,*	Docket No. 87-2048
ENTERPRISE LEASING CORPORATION, a California corporation, *Plaintiff/Appellee,* v. RICHARD CHARLTON, *Defendant/Appellant.*	D.C. No. Civ. 86-1398 PHX CLH (B-79-890-PHX-CLH) (Adversary M) MEMORANDUM*

Appeal from the United States District Court
for the District of Arizona
Charles L. Hardy, District Judge, Presiding
Argued and Submitted February 10, 1988
San Francisco, California
Filed March 24, 1988

Before: WALLACE, REINHARDT and LEAVY, Circuit Judges

Richard Charlton filed for bankruptcy under Chapter 11 of the Bankruptcy Act. Western Savings and Loan held a note from Charlton for approximately $161,000, which was secured by a deed of trust. Enterprise Leasing Corporation also had a deed of trust, a security junior to Western Sav-

*This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

ing's first security position. After Charlton defaulted on both loans, his house was sold to Enterprise at a trustee's sale. Charlton claimed that the sale did not follow required procedures, and that the profits Enterprise made when it resold the home should be set off against Charlton's debt to Enterprise. The bankruptcy court and the district court granted Enterprise summary judgment. We affirm.

Arizona law requires that a trustee's sale occur no earlier than ninety days after the recording of the notice of the sale. A.R.S. § 33-807(C). In this case, though the sale took place more than a year after the recording of the notice, Charlton argues that this provision was violated. Charlton's claim is based on his argument that the running of the ninety dayis tolled by the automatic stay provision of the Bankruptcy Act, former Bankruptcy Rule 401. We disagree. The automatic stay applies to legal actions affecting property rights, not to waiting periods. *See, e.g., In re Pridham*, 31 B.R. 497, 498-99 (Bankr. E.D. Cal. 1983).

Charlton challenges the trustee sale on a second ground. When the sale was noticed Jeffrey Gage was the trustee, and the notice listed Mr. Gage's place of business as the location of the sale. The sale did take place there; however, on the day before the sale, William Piatt replaced Mr. Gage as trustee. Charlton argues that the sale was void because it did not take place at the place of business of the new trustee. We disagree. Piatt was the trustee when the sale was noticed in compliance with Ariz. Rev. Stat. Ann. § 33-810(A). The sale was held, as noticed, at his office. We hold that Piatt was the trustee for the purpose of satisfying Ariz. Rev. Stat. Ann. § 33-808(B) because he was the trustee at the time the sale was noticed, although he was replaced as trustee by Gage before the actual sale. The last issue is the issue of "set-off". Prior to the trustee sale, Western Savings assigned to Enterprise all of its interest in its note and deed of trust. Enterprise thus held both deeds of trust on Charlton's home. Enterprise made the only bid for the home at the trustee sale, $161,000, the full amount then due on Western's note. It subsequently resold the home to a third party for approxi-

mately $90,000 more than it had paid for it at the sale. At an earlier stage of the proceeding than the judgment at issue here, Charlton claimed that Enterprise's two deeds of trust on the home "merged" and that the effect of the trustee's sale was to extinguish the two obligations secured by the deeds. The bankruptcy court denied this claim, granting Enterprise partial summary judgment on that issue. The court stated: "Enterprise's rights pursuant to the note and the deed of trust it acquired from Western are entirely independent from its rights pursuant to the equipment lease and the original deed of trust Charlton provided as security. Thus, Enterprise's foreclosure of its first lien interest did not extinguish the second obligation, even though both obligations were secured by trust deeds to the Rockridge property." Charlton did not appeal the judgment and does not contend that it is now before us.

In the proceeding we review here, Charlton claims that the profits Enterprise received from its resale of the home should be set off against Enterprise's claim on "the second obligation". The bankruptcy court rejected this contention, holding it precluded by its earlier holding on merger. On appeal, the district court affirmed. Whatever the merits of the preclusion ruling, we are required to reject Charlton's claim. Charlton gives no legal reason or authority supporting his contention that the profits Enterprise obtained by reselling a house it had bought in a foreclosure sale should be offset against the debt he owes to Enterprise on the note—and we are aware of none.

For the reasons given above, we affirm the district court's judgment.

APPENDIX B

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

In re: RICHARD CHARLTON, *Debtor/Appellant,* ENTERPRISE LEASING CORPORATION, a California corporation, *Plaintiff/Appellee,* v. RICHARD CHARLTON, *Defendant/Appellant.*	Docket No. 87-2048 D.C. No. Civ. 86-1398 PHX CLH (B-79-890-PHX-CLH) (Adversary M) AMENDED MEMORANDUM*

Appeal from the United States District Court
for the District of Arizona
Charles L. Hardy, District Judge, Presiding
Argued and Submitted February 10, 1988
San Francisco, California
Filed March 24, 1988

Before: WALLACE, REINHARDT and LEAVY, Circuit Judges

Richard Charlton filed for bankruptcy under Chapter 11 of the Bankruptcy Act. Western Savings and Loan held a note from Charlton for approximately $161,000, which was secured by a deed of trust. Enterprise Leasing Corporation also had a deed of trust, a security junior to Western Sav-

*This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

ing's first security position. After Charlton defaulted on both loans, his house was sold to Enterprise at a trustee's sale. Charlton claimed that the sale did not follow required procedures, and that the profits Enterprise made when it resold the home should be set off against Charlton's debt to Enterprise. The bankruptcy court and the district court granted Enterprise summary judgment. We affirm.

Arizona law requires that a trustee's sale occur no earlier than ninety days after the recording of the notice of the sale. A.R.S. § 33-807(C). In this case, though the sale took place more than a year after the recording of the notice, Charlton argues that this provision was violated. Charlton's claim is based on his argument that the running of the ninety days is tolled by the automatic stay provision of the Bankruptcy Act, former Bankruptcy Rule 401. We disagree. The automatic stay applies to legal actions affecting property rights, not to waiting periods. *See, e.g., In re Pridham*, 31 B.R. 497, 498-99 (Bankr. E.D. Cal. 1983).

Charlton challenges the trustee sale on a second ground. When the sale was noticed Jeffrey Gage was the trustee, and the notice listed Mr. Gage's place of business as the location of the sale. The sale did take place there; however, on the day before the sale, William Piatt replaced Mr. Gage as trustee. Charlton argues that the sale was void because it did not take place at the place of business of the new trustee. We disagree. Gage was the trustee when the sale was noticed in compliance with Ariz. Rev. Stat. Ann. § 33-808(A). The sale was held, as noticed, at his office. We hold that Gage was the trustee for the purpose of satisfying Ariz. Rev. Stat. Ann. § 33-808(B) because he was the trustee at the time the sale was noticed, although he was replaced as trustee by Piatt before the actual sale. The last issue is the issue of "set-off". Prior to the trustee sale, Western Savings assigned to Enterprise all of its interest in its note and deed of trust. Enterprise thus held both deeds of trust on Charlton's home. Enterprise made the only bid for the home at the trustee sale, $161,000, the full amount then due on Western's note. It subsequently resold the home to a third party for approxi-

mately $90,000 more than it had paid for it at the sale. At an earlier stage of the proceeding than the judgment at issue here, Charlton claimed that Enterprise's two deeds of trust on the home "merged" and that the effect of the trustee's sale was to extinguish the two obligations secured by the deeds. The bankruptcy court denied this claim, granting Enterprise partial summary judgment on that issue. The court stated: "Enterprise's rights pursuant to the note and the deed of trust it acquired from Western are entirely independent from its rights pursuant to the equipment lease and the original deed of trust Charlton provided as security. Thus, Enterprise's foreclosure of its first lien interest did not extinguish the second obligation, even though both obligations were secured by trust deeds to the Rockridge property." Charlton did not appeal the judgment and does not contend that it is now before us.

In the proceeding we review here, Charlton claims that the profits Enterprise received from its resale of the home should be set off against Enterprise's claim on "the second obligation". The bankruptcy court rejected this contention, holding it precluded by its earlier holding on merger. On appeal, the district court affirmed. Whatever the merits of the preclusion ruling, we are required to reject Charlton's claim. Charlton gives no legal reason or authority supporting his contention that the profits Enterprise obtained by reselling a house it had bought in a foreclosure sale should be offset against the debt he owes to Enterprise on the note—and we are aware of none.

For the reasons given above, we affirm the district court's judgment.

APPENDIX C

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

In re: RICHARD CHARLTON, *Debtor/Appellant,*	Docket No. 87-2048
ENTERPRISE LEASING CORPORATION, a California corporation, *Plaintiff/Appellee,* v. RICHARD CHARLTON, *Defendant/Appellant.*	D.C. No. Civ. 86-1398 PHX CLH (B-79-890-PHX-CLH) (Adversary M) ORDER

Before: WALLACE, REINHARDT and LEAVY, Circuit Judges

The panel has voted to deny the petition for rehearing and to reject the suggestion for rehearing en banc. The full court has been advised of the suggestion for en banc rehearing, and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b). The petition for rehearing is denied and the suggestion for a rehearing en banc is rejected.

APPENDIX D

NOTICE OF TRUSTEE'S SALE

The following legally described trust property will be sold, pursuant to the power of sale under that certain Deed of Trust recorded in Docket 11779 at page 1025, in the office of the County Recorder of Maricopa County, Arizona, at public auction to the highest bidder, at the principal place of business of the Trustee, to-wit: 2000 First National Bank Plaza, 100 West Washington Street, Phoenix, Arizona 85003, in Maricopa County, in or near Phoenix, Arizona, on June 14, 1979, at 10:30 o'clock, A.M. of said day.

SEE EXHIBIT "A" ATTACHED HERETO AND BY THIS REFERENCE INCORPORATED HEREIN

Said sale will be made for cash (payable at close of sale), but without covenant or warranty, express or implied, regarding possession or encumbrances to pay the remaining principal sum of the note(s) secured by said Deed of Trust, namely $123,385.08 with interest thereon as provided in said note(s), advances if any under the terms of said Deed of Trust, interest on advances, if any, fees, charges and expenses of the Trustee and of the trust created by said Deed of Trust.

Name of Trustor named in said Deed of Trust:
RICHARD CHARLTON and WILLIAM W. CLEMENTS, AS CO-TRUSTEES OF THE TRUST UNDER ARTICLE NINTH OF THE WILL OF MELENE W. CHARLTON, DECEASED

Name of Successor of record to said Trustor, if any:
None

Dated March 8, 1979.

Jeffrey L. Gage, a Member of
the State Bar of Arizona

JEFFREY L. GAGE, TRUSTEE

Appendix D-2

STATE OF ARIZONA)
)
County of Maricopa)

The foregoing instrument was acknowledged before me this 8th day of March, 1979, by Jefferey L. Gage, a Member of the State Bar of Arizona as Trustee.

Betty L. Stidham, Notary

My Commission Expires:
October 2, 1981

property as described in Maricopa County, Arizona:

EXCEPT THAT PORTION OF TRACT C, GLENCOE HEIGHTS PLAT TWO, according to Book 23 of Maps, page 13, records of Maricopa County, Arizona, described as follows:

BEGINNING at the Southeast corner of said Tract C; thence South 70 degrees 42 minutes West, 145.89 feet to a point of curve with a curve concave Northwesterly, having a radius of 454.01 feet and a central angle of 21 degrees 20 minutes 07 seconds; thence Southeasterly along said curve, a distance of 169.04 feet to a point on curve; thence North 6 degrees 19 minutes 05 seconds East, 170.94 feet: thence North 88 degrees 19 minutes 05 seconds East, 170.94 feet: thence North 88 degrees 15 minutes 58 seconds East, 169.31 feet; thence North 11 degrees 12 minutes East, 23 feet; thence North 88 degrees 15 minutes 58 seconds East, 59 feet to a point on the East line of said Tract C; thence South 11 degrees 12 minutes West and along the East line of said Tract C, a distance of 25 feet to an angle point in the East line of said Tract C: thence South 28 degrees 68 minutes East 118 feet to the Southeast corner of said Tract C and the point of beginning.

APPENDIX E

§ 33-807. Sale of trust property; power of trustee; foreclosure of trust deed

A. By virtue of his position, a power of sale is conferred upon the trustee of a trust deed under which the trust property may be sold, in the manner provided in this chapter, after a breach or default in performance of a contract, for which the trust property is conveyed as security, or a breach or default of the trust deed. At the option of the beneficiary, a trust deed may be foreclosed in the manner provided by law for the foreclosure of mortgages on real property. The beneficiary, trustee or both shall constitute the proper and complete party plaintiff in any action to foreclose a deed of trust. The power of sale may be exercised by the trustee without express provision therefor in the trust deed.

B. The trustee or beneficiary may file and maintain an action to foreclose a deed of trust at any time before the trust property has been sold under the power of sale. A sale of trust property under the power of sale shall not be held after an action to foreclose has been filed unless the foreclosure action has been dismissed.

C. The power of sale of real property conferred upon the trustee shall not be exercised before the expiration of ninety days from the recording of the notice of the sale.

Added Laws 1971, Ch. 136, § 7.

Historical Note

Source:

R.S.1901, § 3303.
R.S.1913, § 4145.
R.C.1928, § 2312.
C. 1939, § 62-505.

Adopted from Iowa, see I.C.A. § 654.2.

For saving clause contained in Laws 1971, ch. 136, see Historical Note under § 33-801.

Cross References

Deficiency judgment, see § 33-814.

Library References

Mortgages 329. C.J.A. Mortgages § 544 et seq.

Notes of Decisions

Foreclosure 2
Trust property 1

---

1. Trust property

Deed of trust of all property of mining company, real, personal, and mixed, is not restricted to property used in connection with mines, smelter, or railroad. Martin v. Bankers' Trust Co. (1916) 18 Ariz. 55, 156 P.87.

2. Foreclosure

Where purchasers took mortgaged property with knowledge of provision of trust deed that deed secured note already executed and any other notes which mortgagor might execute for advances made by mortgagee, mortgage could be foreclosed against purchasers for amount due on notes. Griffith v. State Mut. Building & Loan Ass'n (1935) 46 Ariz. 359, 51 P.2d 246.

APPENDIX F

PART VI. COLLECTION AND LIQUIDATION OF THE ESTATE

Rule 601

PETITION AS AUTOMATIC STAY AGAINST LIEN ENFORCEMENT

(a) Stay Against Lien Enforcement. The filing of a petition shall operate as a stay of any act or the commencement or continuation of any court proceeding to enforce (1) a lien against property in the custody of the bankruptcy court, or (2) a lien against the property of the bankrupt obtained within 4 months before bankruptcy by attachment, judgment, levy, or other legal or equitable process or proceedings.

(b) Duration of Stay. Except as it may be terminated, annulled, or modified by the bankruptcy court under subdivision (c), (d), or (e) of this rule, the stay shall continue until the bankruptcy case is dismissed or closed, or until the property subject to the lien is, with the approval of the court, set apart as exempt, abandoned, or transferred.

(c) Relief from Stay. On the filing of a complaint seeking relief from a stay provided by this rule, the bankruptcy court shall, subject to the provisions of subdivision (d) of this rule, set the trial for the earliest possible date, and it shall take precedence over all matters except older matters of the same character. The court may, for cause shown, terminate, annul, modify, or condition such stay. A party seeking continuation of a stay against lien enforcement shall show that he is entitled thereto.

(d) Ex Parte Relief from Stay. Upon the filing of a complaint seeking relief from a stay provided by this rule, relief may be granted without written or oral notice to the adverse party if (1) it clearly appears from specific facts shown by affidavit or by a verified complaint that immediate and irreparable injury, loss, or damage will result to the plaintiff before the adverse party or his attorney can be heard in opposition, and (2) the plaintiff's attorney certifies to the

court in writing the efforts, if any, which have been made to give the notice and the reasons supporting his claim that notice should not be required. The party obtaining relief under this subdivision shall give written or oral notice thereof as soon as possible to the trustee or receiver or, if the petitioner or petitioners and, in any event, shall forthwith mail to such person or persons a copy of the order granting relief. On 2 days' notice to the party who obtained relief from a stay provided by this rule without notice or on such shorter notice to the party as the court may prescribe, the adverse party may appear and move its reinstatement, and in that event the court shall proceed to hear and determine such motion as expeditiously as the ends of justice require.

(e) Availability of Other Relief. Nothing in this rule precludes the issuance of, or relief from, any stay, restraining order, or injunction when otherwise authorized.

Rule 602.

DUTY OF TRUSTEE OR RECEIVER TO GIVE NOTICE OF BANKRUPTCY

(a) Real Property. As soon as possible after his qualification a receiver shall record a certified copy of the petition without schedules or of the order of adjudication, if any, in the office where transfers of real property are recorded in every county where the bankrupt has an interest in real property not exempt from execution. If a certified copy of the petition or order of adjudication has not previously been recorded in an office where recordation is required by the preceding sentence, the trustee shall as soon as possible after his qualification record in every such office a certified copy of the petition without schedules or of the order of adjudication, if any, or the order approving his bond. The recording of a copy pursuant to this subdivision is not necessary, however, in the county in which is kept the record of the original proceedings in the case or in any office where such a copy has previously been recorded.

(b) Personal Property. As soon as possible after his qualification a receiver or, if a receiver has not done so, the

trustee shall give notice of the bankruptcy to every person known to be holding money or property subject to withdrawal or order

APPENDIX G

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ARIZONA

In re RICHARD CHARLTON, Debtor. WESTERN SAVINGS AND LOAN ASSOCIATION, an Arizona corporation, Plaintiff, vs. RICHARD CHARLTON, Debtor, Defendant.	In Proceedings For An Arrangement Under Chapter XI No. B-79-890-PHX-VM JUDGMENT AND ORDER APPROVING AND CONFIRMING SETTLEMENT BETWEEN THE DEBTOR AND DEBTOR-IN-POSSESSION RICHARD CHARLTON AND WESTERN SAVINGS WITH RESPECT TO WESTERN SAVINGS COMPLAINT FOR RELIEF FROM STAY

With respect to resolution of the above-captioned adversary proceedings ("F") it appears to this Court that an Agreement entitled "Settlement of Western Savings Complaint For Relief From Stay" has been entered into by and among Western Savings and Loan Association and Richard Charlton, Debtor and Debtor-In-Possession. A true and exact copy of said Agreement is attached hereto as Appendix "1" to this Judgment and Order.

This Court finds and concludes as follows:

a. The Agreement has been approved in writing by the Defendant and Debtor Richard Charlton, as well as Western Savings;

b. Separate and independent from the Settlement among the litigants in the adversary proceedings, the Court is satisfied that the Agreement and this Judgment and Order provide a reasonable and expeditious resolution of the above captioned adversary preceeding and that the Agreement is in the best interest of the Debtor and the unsecured creditors of this estate;

c. This Agreement has been noticed to all creditors and heard by this Court;

NOW, THEREFORE, based upon the foregoing reasons and good cause appearing,

IT IS ORDERED as follows:

1. The Agreement attached hereto as Appendix "1" shall be, and hereby is, approved and confirmed by this Court according to its terms and is hereby incorporated as though fully set forth herein.

2. Any stay or injunction against lien enforcement of any kind, existing now or in a conversion to any other bankruptcy proceeding shall be and hereby is modified as provided in the Agreement so that all creditors may proceed from the entry date of this Judgment and Order to notice trustee's sales or otherwise act procedurally to enforce their interests in the Rockridge Property described in the attached Agreement; *however,* no creditor, individual, or other entity may take, seize, retain, sell, or otherwise dispose of the property or extinguish any interest of other creditors or the Debtor by any process or proceeding until May 1, 1980.

3. This Court retains all jurisdiction necessary to effectuate the attached Agreement and to carry out a sale of the afore-described Rockridge Property free and clear of liens through this Chapter XI proceeding or in any superseding bankruptcy proceeding.

4. The above-captioned adversary proceeding on Western Savings and Loan's Complaint for Relief From Stay is hereby dismissed without prejudice.

DATED, this ____ day of December, 1979.

_____

United States Bankruptcy Judge